

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**REBECCA E. MACIAS CARRASCO** )  
Claimant )

VS. )

**NATIONAL BEEF PACKING CO.** )  
Respondent )

Docket No. 1,045,730

AND )

**AMERICAN ZURICH INSURANCE CO.** )  
Insurance Carrier )

**ORDER**

Claimant and Respondent request review of the July 15, 2009 preliminary hearing Order entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

The Administrative Law Judge (ALJ) found that the claimant failed to give notice of injury within 10 days as required by K.S.A. 44-520 and that written claim was 217 days after claimant was first taken off work on October 7, 2008. The ALJ therefore denied claimant's request for medical treatment.<sup>1</sup>

The claimant requests review of this decision and argues that she provided both timely notice of her back injury (when she sought treatment from the plant nurse on October 7, 2008, telling the nurse that her back was hurting while she was working) as well as a timely written claim (by filing her workers compensation claim within one year of her October 7, 2008 date of accident).

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<sup>1</sup> At the outset of the Preliminary Hearing claimant requested temporary total disability (TTD) benefits in addition to medical treatment. But as the testimony unfolded, claimant's counsel withdrew her request for TTD benefits. Thus, the only issue decided by the ALJ was claimant's request for medical treatment.

Respondent has also appealed the ALJ's decision asserting that the ALJ erroneously determined that claimant's present condition arose out of and in the course of her employment. Respondent maintains claimant's back complaints are attributable to the pneumonia and related coughing complaints she had a few weeks before October 7, 2008.

Although respondent filed a timely appeal, this Board Member will not address respondent's argument at this juncture. The ALJ's Order is silent on the issue of whether claimant's back complaints arose out of and in the course of her employment or whether they were causally connected to her pneumonia symptoms. Thus, it is impossible to determine whether the ALJ actually decided that issue. It is clear that ALJ's decision to deny claimant's request for medical treatment was due solely to her findings that claimant failed to provide timely notice of her injury and to timely file a written claim, both as required by the Kansas Workers Compensation Act. Those findings were determinative of claimant's claim and although the ALJ could have made further findings with respect to the causal connection of claimant's present back complaints and her work activities, there was no need to do so. Typically, the Board will not consider and decide matters that were not ruled upon by the ALJ. For this reason, respondent's argument will not be considered at this time.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

With the exception of certain key facts, the circumstances surrounding this claim are largely undisputed. Claimant began working for respondent in 2000. By her uncontroverted testimony, claimant's job is repetitive and requires her to work in a cold environment, packing and stacking bags of fajita meat. She is to take from the right, pack and bag 18 to 25 pounds of meat and place it to her left, twisting to stack the package.

In the weeks before October 7, 2008, claimant had pneumonia and was off work periodically, with a doctor's note. She returned to work but a few times she would leave early due to ongoing symptoms of coughing. On October 7, 2008, claimant reported to the plant nurse's office. She testified she was unable to make it through her shift and required medical attention. According to claimant, she told the nurse she was having back pain.<sup>2</sup> Claimant says she was asked if she had an accident. Claimant replied that she was working and her back began to hurt. Claimant went on to testify that the nurse told her that she did not hurt her back at work if she didn't have an injury.<sup>3</sup> Claimant tried to explain that

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<sup>2</sup> P.H. Trans. at 6.

<sup>3</sup> *Id.* at 7.

she couldn't stand because of the back pain and that she didn't know the reason for the pain. Claimant says she was instructed to go and see her personal physician because there was no accident.

The two nurses on duty on October 7, 2008 have a different version of the event. According to both Abril Landa and Jackie Ortega, claimant came in to the nurse's office complaining of a bad cough. There was no mention of back pain. Their plant records, which purport to document every encounter, reference only coughing symptoms and nothing about back complaints. Both nurses say that if claimant had told them about her back complaints, it would have been noted.

Claimant left work that same day and met with Dr. Virgilio M. Taduran, her family physician, who took her off work immediately and prescribed medication. His office notes purportedly indicate claimant's chief complaints were back pain.<sup>4</sup> Claimant was later referred to Dr. John M. King who sent her for an MRI and to physical therapy. The MRI of the lumbar spine showed a slight degree of extrinsic compression on the thecal sack at the level of L5-S1 due to small disc osteophyte complex and an increased signal intensity in the facet joint at the level of L4-L5 and L5-S1 due to facet joint arthropathy. That same MRI revealed muscle spasm that were causing straightening of the normal lordotic curvature of the lumbar spine.<sup>5</sup> Claimant was told she could not continue to work.<sup>6</sup> And because she was unable to work the claimant applied for disability. On the application claimant indicated her pain began while she was working.

Claimant applied for short-term disability on December 12, 2008.<sup>7</sup> Although claimant understood she would not get short-term disability benefits if her condition was work-related, she did not complete the forms nor indicate her problems were unrelated to work. Rather, an insurance representative helped her to complete the form and then she signed it. Dr. Juvenal T. Jabel was then consulted regarding the disability claim and he indicated the claimant's injury was not work-related. Dr. King was also consulted and he indicated that he didn't know.<sup>8</sup> The disability payments commenced October 8, 2008 and continued until April 20, 2009 or May 10, 2009.<sup>9</sup>

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<sup>4</sup> Ortega Depo. at 19. The record apparently does not contain Dr. Taduran's records.

<sup>5</sup> P.H. Trans. at 39; Cl. Ex. 1 at 6 (Dec. 12, 2008 MRI Report).

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.* at 22.

<sup>9</sup> The record is inconsistent on the date the short term disability benefits were terminated. Two dates have been listed. P.H. Trans. at 16-18 and 32-33.

Claimant first filed written claim of a work-related accident with respondent on May 12, 2009 through her attorney. She has returned to work but maintains that she requires treatment. It is unclear from the record precisely what treatment is necessary as she is not a surgical candidate and physical therapy has not worked according to claimant. Nonetheless, claimant asks that she be provided with treatment, preferably with Dr. Christian Lothes.

The ALJ concluded that claimant failed to give timely notice of her injury under K.S.A. 44-520 and likewise failed to serve a written claim as required by K.S.A. 44-520a. Accordingly, her request for medical treatment was denied. Based upon the ALJ's Order, it is clear that the ALJ concluded that October 7, 2008 was considered to be claimant's date of accident. This Board Member has reviewed the evidence contained within the record as presently developed and has determined that the ALJ's Order should be reversed.

The threshold issue in this matter is the date of claimant's accident as the time deadlines imposed by K.S.A. 44-520 and 44-520a are all dependent on that initial determination. This determination is further complicated because claimant's work for respondent was, by all accounts, repetitive. Thus, the trier of fact must determine the appropriate date of accident in light of K.S.A. 44-508(d).

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date**

**of accident be the date of, or the day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>10</sup> (Emphasis added.)

It is undisputed that claimant left work pursuant to her own doctor's orders on October 7, 2008. Although claimant says she was referred to her own physician, this Board Member is unpersuaded that Dr. Taturan was an authorized treating physician. Thus, that visit and the resulting directive which took her off work did not trigger the statute.

Continuing on with the analysis, the date of accident or injury should be the earliest of (1) the date written notice was given to respondent or (2) "the date the condition is diagnosed as work related". Here, it appears the earliest date of injury available is May 12, 2009, the date claimant's written notice was given. The second trigger, which requires a diagnosis in writing, has yet to be rendered. In fact, it seems the physicians either don't know if work caused claimant's present back complaints or they believe work did not cause her present condition.

The ALJ concluded that claimant's date of accident was October 7, 2008 and therefore she calculated the period for notice and timely written claim based upon that date. But it does not appear that she considered the implications of the statute. This Board Member finds that claimant's date of accident was not October 7, 2008 because, based on this evidence, there is an insufficient showing that Dr. Taturan was an authorized treating physician. Thus, his release from work did not trigger the statute.

Going on, of the other two remaining possible statutory triggers, the only one that has occurred is "the date upon which the employee gives written notice to the employer of the injury". Under these facts, claimant gave written notice on May 12, 2009. By statute then, this date forms the date of accident. And by serving a written claim on that date claimant simultaneously satisfied the notice statute.

K.S.A. 44-520 provides:

**Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the

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<sup>10</sup> K.S.A. 2005 Supp. 44-508(d).

notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

For these reasons, this Board Member finds that claimant's legal date of injury is, by statute, May 12, 2009. Accordingly, she has satisfied the statutory requisites of timely notice and a timely written claim. It follows then that the ALJ's Order should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>11</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated July 15, 2009, is reversed and remanded for a determination and order regarding claimant's request for medical treatment and a determination on causation as raised by respondent.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2009.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant  
Shirla R. McQueen, Attorney for Respondent and its Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge

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<sup>11</sup> K.S.A. 44-534a.